THE NORTHERN SECURITIES CASE UNDER A NEW ASPECT.

MR. J. L. THORNDIKE, of the Boston Bar, has published, through Messrs. Little, Brown & Co., a review of the decision of the United States Circuit Court of Appeals in the Northern Securities case, which deserves the most careful study. The chief object of Mr. Thorndike's review is to show that the acquisition by the Northern Securities Company of a majority of the shares in the Northern Pacific and Great Northern Railway Companies is neither a restraint of trade, under section 1 of the Sherman Anti-trust Act, nor a monopoly, under section 2 of the same Act.

In order to show that it is not a restraint of trade, Mr. Thorndike makes the following points: 1. As the Act does not at all define "restraint of trade," Congress must be held to have used that term in its legal sense. 2. Restraint of trade means in law any interference by legal means, as distinguished from physical force or violence, with freedom of trade, *i. e.*, with the right which every person has to engage in any lawful trade, and to carry on that trade in any lawful manner that he sees fit. 3. Practically, the only way in which a private person, whether natural or artificial, can thus interfere with the freedom of trade is by means of a contract, *i. e.*, by procuring another person to bind himself by contract not to carry on a particular trade, or to carry it on only subject to certain prescribed restrictions; and accordingly, in the three cases[1]

[1] U. S. *v.* Trans-Missouri Freight Association, 166 U. S. 290; U. S. *v.* Joint Traffic Association, 171 U. S. 505; Addyston Pipe and Steel Co. *v.* U. S., 175 U. S. 211. In the second of these cases, counsel for the defendants contended (pp. 518–519), and the court assumed (pp. 575–578), that whether a contract is in restraint of trade depends upon the effect which it will have upon trade and commerce. It is submitted, however, that the true test is much more simple, namely, the effect that the contract has upon the person bound by it, *i. e.*, whether it deprives him of freedom in carrying on his trade, or any lawful trade, in such manner as he shall see fit. If it has this effect to an unreasonable extent, the common law raises a conclusive presumption that it will be injurious to trade, and if it does this to any extent, it is, as the court holds, prohibited by the statute in question.

Assuming, however, that the statute had used the words "in restraint of competition" instead of the words "in restraint of trade," it would still be true that there must be "restraint," and that there cannot be when there is no contract of any kind, and every person concerned is left perfectly free.

in which the Supreme Court has held that there was a restraint of trade, within section 1 of the Act in question, there was such a contract as has just been described. 4. In the Northern Securities Case, no contract of any kind was entered into by any one, and no restraint was imposed upon any one. 5. The Circuit Court of Appeals has made the mistake of assuming that to destroy or lessen the motive for competition between two or more persons is to restrain trade, whereas it is only in so far as trade is free that the presence or absence of a motive for competition has any operation. 6. The court having said that all competition between the two railway companies would be as completely destroyed by what had been done as if the two railways had been completely consolidated, Mr. Thorndike answers that the complete consolidation of the two railways would be no violation of the Act in question; that the legal obstacles in the way of the consolidation of two or more railways are entirely local, the co-operation of the State or States through which such railways run being indispensable. 7. The law-giver and the court are at complete cross-purposes, the former saying nothing about competition, and the latter saying nothing about restraint of trade.

Mr. Thorndike says the ownership by the Northern Securities Company of a majority of the shares in each of the two railway companies does not constitute a monopoly in the carrying of passengers or goods, as it does not vest in the Northern Securities Company, or in either of the two railway companies, or in any one else, any exclusive right to carry passengers or goods, an exclusive right to carry on some trade being of the essence of every monopoly. Accordingly, the only perfect monopolies are those created by grants from the State or, in England, from the Crown, as the State or the Crown alone can vest in one person the exclusive right to carry on any given trade by excluding all other persons. Such monopolies, created by the Crown, were formerly very common in England, and became an intolerable grievance; and accordingly they were prohibited by the Statute of Monopolies,[1] except in the cases of authors and inventors, as long ago as the time of Lord Coke. It may be observed, however, that all those trades which can be carried on only by the authority of the State (for example, constructing or operating railways) are monopolies, in a qualified sense, in those to whom the state has granted authority to carry

[1] 21 Jac. I. c. 3.

them on, so long as the authority is granted in each case separately, and only after a judicial examination of the merits of the application; but they cease to be monopolies in any legal sense when the State throws them open to every one, merely prescribing the terms and conditions upon which they may be carried on.

It is scarcely necessary to say, however, that monopolies created by the State itself are not those aimed at by section 2 of the Act in question. What then are the monopolies at which the Act aims? Mr. Thorndike says, as we understand him, they can only be such monopolies as are created by contract, as where one person excludes others from the right of competing with him in his trade by procuring them to bind themselves by contract not to carry on that kind of trade; and he thus makes the terms "monopoly" and "restraint of trade," as used in the Act, synonymous, and he thinks this use of the term "monopoly" is justified by the fact that the reason generally given for holding contracts in restraint of trade to be invalid, is that such contracts tend to create monopolies. It must be confessed, however, that such a use of the term, "monopoly," is not common, and Mr. Thorndike can scarcely claim that the Act was intended to be limited to such cases, especially as such a view of the Act would render section 2 useless. Still, if a law-giver prohibits a thing which is found to have no existence, he cannot expect, and presumably would not wish, to have his command enforced against something else which is not within the terms of the prohibition; and this seems to be the situation of section 2 of the Act.

There is, indeed, a species of natural monopoly, as it may be termed, though Mr. Thorndike does not advert to it, as where a person owns mines, the product of which is of such a quality that the product of no other mines can successfully compete with it for many purposes (for example, anthracite coal), or the product of which is so situated in respect to location that the product of no other mines can compete with it except after paying heavy expenses for transportation. Such a monopoly, however, is a mere incident of the ownership of land, and cannot well be prohibited so long as private ownership of land is lawful. It is also true that "monopoly" is one of the vituperative epithets frequently hurled at things commonly called trusts, consolidations, or amalgamations, but Mr. Thorndike has abundantly shown that none of these things have any more of the elements of monopoly than has a partnership which has been formed among several tradesmen for

the purpose of taking over the business of each, and that such a partnership differs from the greatest of the so-called trusts only in size. If, therefore, the latter is held to be a monopoly within section 2 of the Act, the former must be so held also; for that section declares that "*every person* who shall monopolize," etc., "shall be deemed guilty of a misdemeanor," etc.; and the Supreme Court has held[1] that section 1 extends to railways solely by virtue of the words "*every* contract, combination," etc. Mr. Thorndike has also shown that such a partnership as has just been described has no more of the elements of a monopoly than would a partnership formed with the same amount of capital and between the same number of persons, no one of whom had previously been engaged in trade, and each of whom had contributed the agreed amount of capital in cash, and that a complete consolidation of the two railways would have no more of the elements of monopoly than would a single railway company which had built and operated both lines of railway.

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[1] U. S. *v.* Trans-Missouri Freight Association, *supra*.